

10.01: Introduction and Purpose

(1) Introduction. 310 CMR 10.00 is promulgated by the Commissioner of the Massachusetts Department of Environmental Protection pursuant to the authority granted under The Wetlands Protection Act, M.G.L. c. 131, § 40. 310 CMR 10.00 shall complement M.G.L. c. 131, § 40, and shall have the force of law.

310 CMR 10.01 through 10.10 provide definitions and procedures. 310 CMR 10.01 through 10.10 pertains to both inland and coastal areas subject to protection under M.G.L. c. 131, § 40. 310 CMR 10.21 through 10.60 provide standards for work within those areas. 310 CMR 10.21 through 10.37 pertains only to coastal areas and 310 CMR 10.51 through 10.60 pertains only to inland areas. A project may be subject to regulation under 310 CMR 10.00 in which case compliance with all applicable regulations is required.

(2) Purpose. M.G.L. c. 131, § 40 sets forth a public review and decision-making process by which activities affecting Areas Subject to Protection Under M.G.L. c. 131, § 40 are to be regulated in order to contribute to the following interests:

- protection of public and private water supply
- protection of ground water supply
- flood control
- storm damage prevention
- prevention of pollution
- protection of land containing shellfish
- protection of fisheries
- protection of wildlife habitat

The purpose of 310 CMR 10.00 is to define and clarify that process by establishing standard definitions and uniform procedures by which conservation commissions and the Department may carry out their responsibilities under M.G.L. c. 131, § 40. Applicants and issuing authorities shall use forms provided by the Department to implement 310 CMR 10.00.

310 CMR 10.00 is intended solely for use in administering M.G.L. c. 131, § 40; nothing contained herein should be construed as preempting or precluding more stringent protection of wetlands or other natural resource areas by local by-law, ordinance or regulation.

10.02: Statement of Jurisdiction

(1) Areas Subject to Protection Under M.G.L. c. 131, § 40. The following areas are subject to protection under M.G.L. c. 131, § 40:

- | | | |
|--|-------------------------|--|
| <p>(a) Any bank,
any freshwater wetland,
any coastal wetland,
any beach,
any dune,
any flat,
any marsh,
or any swamp</p> | <p>bordering
on</p> | <p>the ocean
any estuary
any creek
any river
any stream
any pond
or any lake</p> |
|--|-------------------------|--|
- (b) Land under any of the water bodies listed above
- (c) Land subject to tidal action
- (d) Land subject to coastal storm flowage
- (e) Land subject to flooding
- (f) Riverfront area.

(2) Activities Subject to Regulation Under M.G.L. c. 131, § 40.

(a) Activities Within the Areas Subject to Protection Under M.G.L. c. 131 § 40. Except for minor activities within the riverfront area meeting the requirements of 310 CMR ~~10.58(6)(b)~~ 10.02(2)(b)i. or ii, any activity proposed or undertaken within an area specified in 310 CMR 10.02(1) which will remove, fill, dredge or alter that area is subject to Regulation under M.G.L. c. 131, § 40 and requires a filing of a Notice of Intent.

(b) Activities Within the Buffer Zone. Any activity other than minor activities identified in 310 CMR 10.58(6)(b) proposed or undertaken within 100 feet of an area specified in 310 CMR 10.02(1)(a) (hereinafter called the Buffer Zone) which, in the judgement of the issuing authority, will alter an Area Subject to Protection Under M.G.L. c. 131, § 40 is subject to regulation under M.G.L. c. 131, § 40 and requires the filing of a Notice of Intent. [See also

10.02: continued

310 CMR 10.05(3)(a)2.] The areas subject to jurisdiction identified in 310 CMR 10.02(1)(b) to (f) do not have a buffer zone. ~~Minor activities within the buffer zone meeting the requirements of 310 CMR 10.58(6)(b) are not subject to regulation under M.G.L. c. 131, § 40.~~

- (i) ~~Minor activities within the buffer zone and outside any areas specified in 310 CMR 10.02(1)(a-d) are not subject to regulation under M.G.L. c. 131, s. 40:~~
 - a. ~~Unpaved pedestrian walkways for private use;~~
 - b. ~~Fencing, provided it will not constitute a barrier to wildlife movement; stonewalls; stacks of cordwood;~~
 - c. ~~Vista pruning, provided the activity is located more than 50 feet from the mean annual high water line within a riverfront area or from bordering vegetated wetland, whichever is farther. (Pruning of landscaped areas is not subject to jurisdiction under 310 CMR 10.00.);~~
 - d. ~~Plantings of native species of trees, shrubs, or groundcover, but excluding turf lawns;~~
 - e. ~~The conversion of lawn to uses accessory to residential structures [delete: existing single family houses in existence on August 7, 1996,] such as decks, sheds, patios, and pools, and the expansion of residential structures by up to 20% of the existing footprint, provided the activity is located more than 50 feet from the mean annual high-water line within the riverfront area or from bordering vegetated wetland, whichever is farther, and erosion and sedimentation controls are implemented during construction. The conversion of such uses accessory to existing single family houses to lawn is also allowed. (Mowing of lawns is not subject to jurisdiction under 310 CMR 10.00);~~
 - f. ~~The conversion of impervious to vegetated surfaces, provided erosion and sedimentation controls are implemented during construction; and~~
 - g. ~~Activities that are temporary in nature, have negligible impacts, and are necessary for planning and design purposes (e.g., installation of monitoring wells, exploratory borings, sediment sampling and surveying).~~
- (ii) ~~Activities within the buffer zone and outside any areas specified in 310 CMR 10.02(1) are not subject to regulation under M.G.L. c. 131, s. 40, provided the boundary of any resource areas specified in 310 CMR 10.02(2) within 100 feet of a resource area is confirmed through an Order of Resource Area Delineation and the applicant certifies that 310 CMR 10.02(2)(b)(ii)a. through e. will be met:~~
 - (a) ~~At a minimum, no work is proposed in a 50-foot wide area in the buffer zone along any resource area;~~
 - (b) ~~Stormwater is managed according to standards established by the Department and the conservation commission concurs. If the conservation commission does not concur, it shall specify the standards that are not met and the applicant shall file a Notice of Intent;~~
 - (c) ~~The buffer zone where the work is proposed does not border an Outstanding Resource Water (i.e., certified vernal pool, public water supply, or certain ACECs identified in 314 CMR 4.00);~~
 - (d) ~~The buffer zone does not contain estimated wildlife habitat which is identified on the most recent Estimated Habitat Map of State-listed Rare Wetlands Wildlife of the Natural Heritage and Endangered Species Program; and~~
 - (e) ~~Erosion and sedimentation controls are installed and maintained at the limit of work sufficient to protect resource areas during construction.~~
- iii. ~~Activities within the buffer zone which do not meet the requirements of 310 CMR 10.02(2)(b) i. and ii. are subject to preconstruction review through the filing of a Determination of Applicability to clarify jurisdiction or a Notice of Intent under the provisions of 310 CMR 10.05(4) and 310 CMR 10.53(1).~~

10.02: continued

(c) Activities Outside the Areas Subject to Protection Under M.G.L. c. 131, § 40 and the Buffer Zone. Any activity proposed or undertaken outside the areas specified in 310 CMR 10.02(1) and outside the Buffer Zone is not subject to regulation under M.G.L. c. 131, § 40 and does not require the filing of a Notice of Intent unless and until that activity actually alters an Area Subject to Protection Under M.G.L. c. 131, § 40.

In the event that the issuing authority determines that such activity has in fact altered an Area Subject to Protection Under M.G.L. c. 131, § 40, it **may require the filing of a Notice of Intent or issue an Enforcement Order and** shall impose such conditions on the activity or any portion thereof as it deems necessary to contribute to the protection of the interests identified in M.G.L. c. 131, § 40.

(3) Notwithstanding the provisions of 310 CMR 10.02(1) and (2), any bordering vegetated wetland, bank, land under water, land subject to flooding, or riverfront area created for the purpose of stormwater management shall not require the filing of a Notice of Intent or a Request for Determination of Applicability to maintain the stormwater management system, provided that the work is limited to the maintenance of the stormwater management system and conforms to an Order of Conditions issued after April 1, 1983 and that the area is not altered for other purposes.

Commentary

The Department has determined that activities within Areas Subject to Protection Under M.G.L. c. 131, § 40 are so likely to result in the removing, filling, dredging or altering of those areas that preconstruction review is always justified, and that the issuing authority shall therefore always require the filing of a Notice of Intent for said activities.

The Department has determined that activities within 100 feet of those areas specified in 310 CMR 10.02(1)(a) are sufficiently likely to alter said areas that preconstruction review may be necessary. Therefore, a request for a Determination of Applicability must be filed for **all some** activities within the Buffer Zone. The issuing authority shall then make a determination as to whether the activity so proposed will alter an Area Subject to Protection Under M.G.L. c. 131, § 40 and, if so, shall require the filing of a Notice of Intent for said activities. The issuing authority shall not require the filing of a Notice of Intent if it determines that the activity proposed within the Buffer Zone will not alter an Area Subject to Protection Under M.G.L. c. 131, § 40. **The Department has established simplified review criteria for eligible activities within the buffer zone more than 50 feet from resource areas.**

The Department has determined that activities outside the Areas Subject to Protection Under M.G.L. c. 131, § 40 and outside the Buffer Zone are so unlikely to result in the altering of Areas Subject to Protection Under M.G.L. c. 131, § 40 that preconstruction review is not required, and therefore the issuing authority shall not regulate said activities unless and until they actually result in the altering of an Area Subject to Protection Under M.G.L. c. 131, § 40.

10.03: General Provisions

(1) Burden of Proof.

(a) Any person who files a Notice of Intent to perform any work within an Area Subject to Protection Under M.G.L. c. 131, § 40 or within the Buffer Zone has the burden of demonstrating to the issuing authority:

1. that the area is not significant to the protection of any of the interests identified in M.G.L. c. 131, § 40; or
2. that the proposed work within a resource area will contribute to the protection of the interests identified in M.G.L. c. 131, § 40 by complying with the general performance standards established by 310 CMR 10.00 for that area.
3. that proposed work within the buffer zone will contribute to the protection of the interests identified in M.G.L. c. 131, § 40, except that proposed work which lies both within the riverfront area and within all or a portion of the buffer zone to another resource area shall comply with the performance standards for riverfront areas at 310 CMR 10.58. For minor activities as specified in 310 CMR 10.58(6)(b) within the riverfront area or the buffer zone to another resource area, the Department has determined that additional conditions are not necessary to contribute to the protection of

the interests identified in M.G.L. c. 131, § 40.

10.03: continued

(4) Presumption Concerning Point-Source Discharges. If the Department has issued a permit pursuant to M.G.L. c. 21, § 43, in conjunction with a federal NPDES (National Pollutant Discharge Elimination System) permit for any new point-source discharge of pollutants, or will issue such a permit, prior to commencement of the discharge, the effluent limitations established in the permit shall be presumed to protect the eight interests identified in M.G.L. c. 131, § 40 with respect to the effects of the discharge on water quality. The permit and any subsequent amendments thereto shall be referenced in the Order and deemed incorporated therein.

This presumption shall apply only to impacts of the discharge from the source, and not to impacts from construction of the source.

This presumption may be overcome only by credible evidence from a competent source that said effluent limitations will not protect the interests identified in M.G.L. c. 131, § 40.

(5) Presumption of Significance. Each Area Subject to Protection Under M.G.L. c. 131, § 40 is presumed to be significant to one or more of the interests identified in M.G.L. c. 131, § 40. These presumptions are rebuttable and are set forth in 310 CMR 10.21 through 10.60.

For riverfront areas, the issuing authority may find that the presumptions of significance are partially rebutted as provided in 310 CMR 10.58(3).

(6) Presumption Concerning Application of Herbicides.

(a) Any application of herbicides within any Area Subject to Protection Under M.G.L. c. 131, § 40 or the Buffer Zone associated with a structure or facility which is:

1. existing and lawfully located;
2. used in the service of the public; and
3. used to provide electric, gas, water, telephone, telegraph and other telecommunication services

shall be presumed to constitute work performed in the course of maintaining such structure or facility, and shall be accorded the exemption of such work under M.G.L. c. 131, § 40, only if the application of herbicides to that structure or facility is performed in accordance with such plans as are required by the Department of Food and Agriculture pursuant to 333 CMR 11.00: *Rights of Way Management*, effective July 10, 1987.

(b) Any application of herbicides within the Buffer Zone, other than as provided in 310 CMR 10.03(6)(a), shall be presumed not to alter an Area Subject to Protection Under M.G.L. c. 131, § 40, only if the work is performed in accordance with such plans as are required by the Department of Food and Agriculture pursuant to 333 CMR 11.00: *Rights of Way Management*, effective July 10, 1987. This presumption shall apply only if the person proposing such activity has requested and obtained a determination of the boundaries of the Buffer Zone and Areas Subject to Protection Under M.G.L. c. 131, § 40 in accordance with 310 CMR 10.05(3)(a)1. and 2; and has submitted that determination as part of the Vegetation Management Plan.

(c) Any application of herbicides for management of rights of way within a riverfront area not subject to 310 CMR 10.03 (6)(a) or (b), provided the area is outside any other resource area and qualifies under the provisions of 310 CMR 10.58(6)(a), shall be accorded an exemption of such work under M.G.L. c. 131, § 40, provided that the application of herbicides is performed in accordance with such plans as are required by the Department of Food and Agriculture pursuant to 333 CMR 11.00: *Rights of Way Management*.

(7) Fees.

(a) General Fee Provisions.

1. Notices of Intent. All Notices of Intent filed pursuant to 310 CMR 10.00 shall be accompanied by a filing fee, the amount of which shall be determined by 801 CMR 4.02(310) (Executive Office for Administration and Finance) or 310 CMR 4.00 as applicable, and a brief statement indicating how the applicant calculated the fee. 50% of any filing fee in excess of \$25.00 shall be made payable, by check or money order, to the Commonwealth of Massachusetts and shall be sent to the DEP Lock Box accompanied by the Notice of Intent Fee Transmittal Form. The remainder of said fee shall be made payable, by check or money order, to the city or town in which the work is proposed.

10.03: continued

2. Requests for Action by the Department. Any person who files a Request for a Superseding Determination of Applicability (310 CMR 10.05(3)(c)), a Request for Superseding Order of Conditions (310 CMR 10.05(7)(a)), a Request for Adjudicatory Hearing (310 CMR 10.05(7)(j)), a Request to Intervene in any Adjudicatory Hearing (310 CMR 1.01(9)(a)), or a Request for a Variance, (310 CMR 10.05(10)), (see also 310 CMR 10.03(7)(e)), shall simultaneously submit a filing fee, in the amount specified by 801 CMR 4.02(310) or 310 CMR 4.00 as applicable. All such fees shall be paid by check or money order payable to the Commonwealth of Massachusetts and shall be sent to the DEP Lock Box, accompanied by the Request for Departmental Action Fee Transmittal Form. A copy of the Request for Departmental Action Fee Transmittal Form and a copy of the check shall accompany the request for Departmental action.

(b) Specific Provisions for Notice of Intent Fees. In accordance with General Instructions for Completing a Notice of Intent and Abbreviated Notice of Intent, the minimum submittal requirements shall include payment of the filing fee specified in 801 CMR 4.02(310) or 310 CMR 4.00 as applicable. A conservation commission shall notify, in writing, the appropriate Department Regional Office and the applicant when the correct filing fee has not been paid to the city or town and the filing is therefore incomplete. Said notification shall specify the correct fee amount. The Department shall also notify, in writing, the applicant and the conservation commission when the fee due to the Department has not been paid to the Department and the filing is therefore incomplete. Said notification shall specify the fee due to the Department. The fee will be based on the initial project design as proposed in the Notice of Intent.

1. Disputes over Notice of Intent Filing Fees. Whenever the conservation commission or the Department determines that an inadequate fee has been paid, the time period for the conservation commission or the Department to act shall be stayed until the balance of the fee is paid.

a. Where, in the opinion of the conservation commission or the Department, less than the full filing fee has been included with the Notice of Intent, the Notice shall be deemed complete (assuming all other minimum submittal requirements have been met), and the stay shall be lifted, upon payment of the additional fee specified by the Department or the conservation commission. If the applicant has disputed all or a part of the balance of the fee, after issuance of a Final Order which resolves the fee dispute, in favor of the applicant any disputed funds paid by the applicant in excess of the filing fee as determined in the Final Order shall be paid to the applicant by the Commonwealth and the city or town.

b. In lieu of paying any disputed amount of the filing fee, the applicant may file a Request for Determination of Applicability under 310 CMR 10.05(3)(a), with sufficient information to enable the conservation commission to determine the extent of the area, or the type and extent of the activity, subject to protection under M.G.L. c. 131, § 40.

When a Request For Determination of Applicability is filed by an Applicant to resolve a dispute over the filing fee, all proceedings under the Notice of Intent shall be stayed until all appeal periods for the Determination have elapsed or, if the Determination is appealed until all proceedings before the Department have been completed.

A Final Determination of Applicability as to the area, or the type and extent of the activity, subject to protection under M.G.L. c. 131, § 40 shall be binding on all parties and shall be used in calculating the fee.

(c) Activities Subject to Notice of Intent Fees. The following activity descriptions are intended to include all activities subject to filing of a Notice of Intent under M.G.L. c. 131 § 40. The fees imposed by 310 CMR 10.03 are applicable only to those activities subject to jurisdiction under M.G.L. c. 131, § 40. The fee for work proposed under a single Notice of Intent that involves more than one activity noted below, shall be determined by adding the fees for each of the proposed activities. When the work involves activities within the riverfront area as well as another resource area or the buffer zone, the fee shall be determined by adding an additional 50% of the fee calculated for activities in another resource area(s) or the buffer zone to another resource area for each of the proposed activities within the riverfront area. When the work involves activities within the riverfront area but no other resource area, the fee shall be determined by adding the fees for each of the proposed activities within the riverfront area.

10.03: continued

1. Category 1.

- a. Any work on a single family residential lot including a house addition, deck, garage, garden, pool, shed, or driveway. Activities excluded from Category 1 include driveways reviewable under 310 CMR 10.53(3)(e) (See Category 2f); construction of an unattached single family house; and construction of a dock, pier, or other coastal engineering structure.
- b. Site preparation of each single family house lot, including removal of vegetation, excavation and grading, where actual construction of the house is not proposed under the Notice of Intent.
- c. Control of nuisance vegetation by removal, herbicide treatment or other means, from a resource area, on each single family lot, as allowable under 310 CMR 10.53(4).
- d. Resource improvement allowed under 310 CMR 10.53(4), other than removal of aquatic nuisance vegetation, as allowed under 310 10.53(4).
- e. Construction, repair, replacement or upgrading of a subsurface septic system or any part of such a system.
- f. Activities associated with installation of a monitoring well, other than construction of an access roadway thereto.
- g. New agriculture, including forestry on land in forest use (310 CMR 10.53(3)(r) and (s)), and aquacultural projects.

2. Category 2:

- a. Construction of each single family house (including single family houses in a subdivision), any part of which is in a buffer zone or resource area. Any activities associated with the construction of said house(s), including associated site preparation and construction of retention/detention basins, utilities, septic systems, roadways and driveways other than those roadways or driveways reviewable under 310 CMR 10.53(3)(e)(See Category 2f), shall not be subject to additional fees if all said activities are reviewed under a single Notice of Intent. (For apartment/condominium type buildings see Category 3.)
- b. Parking lot of any size.
- c. The placement of sand for purposes of beach nourishment.
- d. Any projects reviewable under 310 CMR 10.24(7)(a) through (c).
- e. Any activities reviewable under 310 CMR 10.53(3)(d) and 310 CMR 10.53(3)(f) through (l), except for those subject to 310 CMR 10.03(7)(c)4.b. Where more than one activity is proposed within an identical footprint (e.g., construction of a sewer within the footprint of a new roadway), only one fee shall be payable.
- f. Construction of each crossing for a driveway associated with an unattached single family house, reviewable under 310 CMR 10.53(3)(e).
- g. Any point source discharge.
- h. Control of nuisance vegetation, other than on a single family lot, by removal, herbicide treatment or other means, reviewable under 310 CMR 10.53(4).
- i. Raising or lowering of surface water levels for flood control or any other purpose.
- j. Any other activity not described in Categories 1, 3, 4 ~~or~~ 5 or 6 (e.g., the determination of whether a stream is perennial or intermittent).
- k. The exploration for (but not development, construction, expansion, maintenance, operation or replacement of) public water supply wells or wellfields derived from groundwater, reviewable under 310 CMR 10.53(3)(o).

3. Category 3:

- a. Site preparation, for any development other than an unattached single family house(s), including the removal of vegetation, excavation and grading, where actual construction is not proposed in the Notice of Intent.
- b. Construction of each building for any commercial, industrial, institutional, or apartment/condominium/townhouse-type development, any part of which is in a buffer zone or resource area. Any activities associated with the construction of said building, including associated site preparation and construction of retention/detention basins, septic systems, parking lots, utilities, point source discharges, package sewage treatment plants, and roadways and driveways other than those roadways or driveways reviewable under 310 CMR 10.53(3)(e), shall not be subject to additional fees if all said activities are reviewed under a single Notice of Intent.

- c. Construction of each roadway or driveway, not reviewable under 310 CMR 10.53(3)(e), and not associated with construction of an unattached single family house.
- d. Any activity associated with the clean up of hazardous waste, except as otherwise noted in Category 4, including excavation, destruction of vegetation, change in subsurface hydrology, placement of collection wells or other structures for collection and treatment of contaminated soil and/or water.
- e. The development, construction, expansion, maintenance, operation, or replacement of (but not exploration for) public water supply wells or wellfields derived from groundwater, reviewable under 310 CMR 10.53(3)(o).
- 4. Category 4:
 - a. Construction of each crossing for a limited project access roadway or driveway reviewable under 310 CMR 10.53(3)(e) associated with a commercial, industrial, or institutional development or with any residential construction (other than a roadway or driveway associated with construction of an unattached single family house).
 - b. Construction, modification, or repair of a flood control structure such as a dam, reservoir, tidegate, sluiceway, or appurtenant works.
 - c. Creation, operation, maintenance or expansion of a public or private landfill.
 - d. Creation, operation, maintenance or expansion of a public or private sand and/or gravel operation including but not limited to excavation, filling, and stockpiling.
 - e. Construction of new railroad lines or extensions of existing lines, including ballast area, placement of track, signals and switches and other related structures.
 - f. Construction, reconstruction, expansion, or maintenance of any bridge, except to gain access to a single family house lot.
 - g. Any alteration of a resource area(s) to divert water for the clean up of a hazardous waste site, for non-exempt mosquito control projects, or for any other purpose not expressly identified elsewhere in this fee schedule.
 - h. Any activities, including the construction of structures, associated with a dredging operation conducted on land under a waterbody, waterway, or the ocean. If the dredging is directly associated with the construction of a new dock, pier or other structure identified in Category 5, only the Category 5 fee shall apply.
 - i. Construction of, or the discharge from, a package sewage treatment plant.
 - j. Airport vegetation removal projects reviewable under 310 CMR 10.24(7)(c)5. and 10.53(3)(n).
 - k. Landfill closure projects reviewable under 310 CMR 10.24(7)(c)4. and 10.53(3)(p).
 - l. Any activities, including the construction of structures, associated with the assessment, monitoring, containment, mitigation, and remediation of, or other response to, a release or threat of release of oil and/or hazardous material reviewable under 310 CMR 10.24(7)(c)6. or 310 CMR 10.53(3)(q).
- 5. Category 5: Construction, reconstruction, repair or replacement of docks, piers, revetments, dikes, or other engineering structures on coastal or inland resource areas, including the placement of rip rap or other material on coastal or inland resource areas.
- 6. Category 6: [The linear delineation \(e.g., ~~Delineation of~~ bordering vegetated wetland, riverfront area, bordering land subject to flooding\) of each resource area constitutes a separate activity.- The fee associated with each resource area delineation proposed under a Notice of Resource Area Delineation shall be determined by adding the fees for each type of resource area delineation.](#)
- (d) Requests for Action by the Department. Any person's request for action by the Department will not be deemed complete and time periods, if any, shall not commence, unless the person making the request has paid the appropriate filing fee specified in 801 CMR 4.02 (310).
- (e) Fees for Requests for Action by Department. The following requests for action by the Department are subject to the fees established by the Executive Office for Administration and Finance at 801 CMR 4.02(310).
 - 1. Request for a Superseding Determination of Applicability.
 - 2. Request for a Superseding Order of Conditions.
 - 3. Request for an Adjudicatory Hearing or for a Variance which is necessary to avoid an unconstitutional taking.
 - 4. Request to Intervene in an Adjudicatory Proceeding.

5. Request for a Variance, except where necessary to avoid an unconstitutional taking.
(f) Waivers and Exemptions. See 801 CMR 4.02(310) [or 310 CMR 4.00 as applicable](#) for provisions concerning waivers or exemptions from the requirements of 310 CMR 10.03(7).

2. the reconstruction of existing dikes, the reconstruction and expansion of existing ponds and reservoirs, and the construction of tailwater recovery ponds and by-pass canals/channels occurring partly or entirely within a Bordering Vegetated Wetland, when directly related to production or raising of the agricultural commodities referenced in 310 CMR 10.04(Agriculture)(a), in accordance with the following:

- a. Prior to performing the work, the person claiming the exemption shall submit to the conservation commission for its review at a public meeting that portion of a certified farm Conservation Plan (CP) which relates to the work to be conducted in a Bordering Vegetated Wetland. The CP must be prepared in cooperation with the U.S.D.A. ~~Natural Resource Conservation Service (NRCS) Soil Conservation Service (SCS) and comply with the terms of the January 20, 1993,~~ Memorandum of Understanding (MOU) between the Department and ~~NRCS~~ concerning ~~Cp~~Ps;
- b. The conservation commission may, within 21 days of receiving the CP, provide the person claiming the exemption with written notification containing specific comments detailing the manner in which the CP has not been prepared in compliance with the terms of the MOU;
- c. The person claiming the exemption shall provide SCS with a complete copy of the notification;
- d. All revisions to the CP that relate to the delineation of Bordering Vegetated Wetlands shall be submitted to the conservation commission in accordance with 310 CMR 10.04(Agriculture)(c)(2);
- e. All work shall be done in accordance with the CP; and
- f. The maximum amount of Bordering Vegetated Wetland which may be altered by the above activities is:
 - i. 5,000 square feet for reconstruction of an existing dike;
 - ii. 10,000 square feet for expansion of an existing pond or reservoir;
 - iii. 10,000 square feet for construction of a tailwater recovery pond; and
 - iv. 5,000 square feet for construction of a by-pass canal/channel.

Alter means to change the condition of any Area Subject to Protection Under M.G.L. c. 131, § 40. Examples of alterations include, but are not limited to, the following:

- (a) the changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood retention areas;
- (b) the lowering of the water level or water table;
- (c) the destruction of vegetation;
- (d) the changing of water temperature, biochemical oxygen demand (BOD), and other physical, biological or chemical characteristics of the receiving water.

Provided, that when the provisions of 310 CMR 10.03(6) and 10.05(3) or 333 CMR 11.03(9) have been met, the application of herbicides in the Buffer Zone in accordance with such plans as are required by the Department of Food and Agriculture pursuant to 333 CMR 11.00: *Right of Way Management*, effective July 10, 1987, is not an alteration of any Area Subject to Protection Under M.G.L. c. 131, § 40.

Applicant means any person who files a Notice of Intent, or on whose behalf such a notice is filed.

Aquaculture.

- (a) Land in aquacultural use means land presently and primarily used in the growing of aquatic organisms under controlled conditions, including one or more of the following uses: raising, breeding or producing a specified type of animal or vegetable life including, but not limited to, finfish such as carp, catfish, black bass, flatfishes, herring, salmon, shad, smelt, sturgeon, striped bass, sunfishes, trout, whitefish, eel, tilapia; shellfish such as shrimp, crabs, lobster, crayfish, oysters, clams, periwinkles, scallops, mussels, squid; amphibians such as frogs; reptiles such as turtles; seaweeds such as irish moss and dulse; and edible freshwater plants.

10.04: continued

Wildlife means all mammals, birds, reptiles and amphibians and, for the purposes of 310 CMR 10.37 and 10.59, all vertebrate and invertebrate animal species which are officially listed by the Massachusetts Division of Fisheries and Wildlife under 321 CMR 8.00 as endangered, threatened, or of special concern.

Wildlife habitat is defined in M.G.L. c. 131, § 40, para. 14.

Work means the same as activity.

10.05: Procedures

(1) Time Periods. All time periods of ten days or less specified in M.G.L. c. 131, § 40 and 310 CMR 10.00 shall be computed using business days only. In the case of a determination or Order, such period shall commence on the first day after the date of issuance and shall end at the close of business on the tenth business day thereafter. All other time periods specified in M.G.L. c. 131, § 40 and 310 CMR 10.00 shall be computed on the basis of calendar days, unless the last day falls on a Saturday, Sunday or legal holiday, in which case the last day shall be the next business day following.

(2) Actions by Conservation Commission. Where M.G.L. c. 131, § 40 states that a particular action (except receipt of a request or notice) is to be taken by the conservation commission, that action is to be taken by more than half the members present at a meeting of at least a quorum. A quorum is defined as a majority of the members then in office.

Where M.G.L. c. 131, § 40 states that an order or notification shall be signed by a majority of the conservation commission, that action is to be taken by a majority of the members then in office, who need not convene as a body in order to sign, provided they met pursuant to the open meeting law, M.G.L. c. 39, §§ 23A through 23C, when voting on the matter.

Where M.G.L. c. 131, § 40 states that the conservation commission is to receive a request or notice, conservation commission means a member of the conservation commission or an individual designated by the conservation commission to receive such request or notice.

(3) Determinations of Applicability.

(a) Requests for Determination of Applicability.

1. Any person who desires a determination as to whether M.G.L. c. 131, § 40 applies to land, or to work that may affect an Area Subject to Protection under M.G.L. c. 131, § 40, may submit to the conservation commission by certified mail or hand delivery a Request for a Determination of Applicability, Form 1. **Applicants shall file an Abbreviated Notice of Resource Area Delineation to confirm a delineated boundary of bordering vegetated wetlands and other resource areas on the site to establish the extent of the buffer zone and resource areas prior to filing a Notice of Intent for proposed work. Alternatively, the boundary of bordering vegetated wetland (or other resource areas) may be determined through the filing of a Notice of Intent.** For work within riverfront areas, an applicant may submit to the conservation commission by certified mail or hand delivery a Request for Determination of Applicability to identify the scope of alternatives to be evaluated under 310 CMR 10.58(4)(c)2., including sufficient information to enable the conservation commission to determine the applicable scope.
2. Any person who proposes to perform work within the Buffer Zone shall submit to the conservation commission either a Notice of Intent for such work or a Request for Determination of Applicability. Said request shall include sufficient information, as required on Form 1, to enable the conservation commission to find and view the area and to determine whether the proposed work will alter an Area Subject to Protection Under M.G.L. c. 131, § 40. **Applicants shall use the Abbreviated Notice of Resource Area Delineation to confirm the boundaries of resource areas and the buffer zone and to certify that the requirements of 310 CMR 10.02(2)(b)ii. have been met for waiver of review for activities in the buffer zone.**

Any person who proposes to apply herbicides in the Buffer Zone pursuant to the presumption of 310 CMR 10.03(6)(b) shall be required only to submit a request for determination of the boundaries of the Buffer Zone and the Areas Subject to Protection Under M.G.L. c. 131, § 40. Such Request for Determination shall be submitted prior to the filing of the Vegetation Management Plan, as required by 333 CMR 11.00, on maps

(b) Determination of Applicability.

1. Within 21 days after the date of receipt of the Request for a Determination of Applicability, the conservation commission shall issue a Determination of Applicability, Form 2. Notice of the time and place of the public meeting at which the determination will be made shall be given by the conservation commission at the expense of the person making the request not less than five days prior to such meeting, by publication in a newspaper of general circulation in the city or town in which the land is located, and by mailing a notice to the person making the request, the owner, the board of health and the planning board of said city or town. Notice shall also be given in accordance with the open meeting law, M.G.L. c. 39, § 23B. Said determination shall be signed by a majority of the conservation commission, and copies thereof shall be sent by the conservation commission to the Department, to the person making the request, and to the owner. Delivery of the copy to the person making the request shall be by hand delivery or certified mail, return receipt requested. Said determination shall be valid for three years from the date of issuance, except that a determination of the boundaries of the Areas Subject to Protection Under M.G.L. c. 131, § 40 and the Buffer Zone which are to apply to such plans as are required by the Department of Food and Agriculture pursuant to 333 CMR 11.00: *Rights of Way Management*, effective July 10, 1987, shall be valid throughout the effective duration of the Vegetation Management Plan.
2. The conservation commission shall find that M.G.L. c. 131, § 40 applies to the land, or a portion thereof, if it is an Area Subject to Protection Under M.G.L. c. 131, § 40 as defined in 310 CMR 10.02(1). The conservation commission shall find that M.G.L. c. 131, § 40 applies to the work, or portion thereof, if it is an Activity Subject to Regulation Under M.G.L. c. 131, § 40 as defined in 310 CMR 10.02(2). The conservation commission shall identify the scope of alternatives to be evaluated, if requested, for work within riverfront areas under 310 CMR 10.58(4)(c)2..
3. A Notice of Intent which is filed as a result of a positive determination, whether such determination is made by the Department or a conservation commission, shall be filed with the conservation commission, and all of the procedures set forth in 310 CMR 10.05(4) shall apply.

(c) Appeal to the Department. Following a positive or negative Determination of Applicability, the identification of the scope of alternatives for work within the riverfront area, or the failure of a conservation commission to make a determination within 21 days, any person specified in 310 CMR 10.05(7) may, within ten days, request the Department to issue a Superseding Determination of Applicability pursuant to the procedures set forth in 310 CMR 10.05(7). The Department shall issue its determination within 35 days from receipt of such request.

(d) Work Pending Appeal of Determination.

1. Upon a positive Determination of Applicability by a conservation commission, work may not proceed until the Department or the Commissioner issues a negative determination, or until a Notice of Intent has been filed, a final order has been issued and recorded, and all administrative appeal periods have elapsed, except that a Notice of Intent shall not be required for the application of herbicides in accordance with 310 CMR 10.03(6).
2. Upon a positive Determination of Applicability by the Department, work may not proceed until the Commissioner issues a negative determination or until a Notice of Intent has been filed, a final order has been issued and recorded, and all administrative appeal periods have elapsed.
3. Upon a positive Determination of Applicability by the Commissioner, work may not proceed until a judicial determination is made that the proposed work is not subject to M.G.L. c. 131, § 40 or until a Notice of Intent has been filed and a final order has been issued and recorded, and all administrative appeal periods have elapsed.
4. Upon a negative Determination of Applicability by a conservation commission or upon the failure of a conservation commission to act within the 21 day time period, and where the Department has been requested to issue a Superseding Determination of Applicability but has failed to do so within 35 days, work may proceed at the owner's risk upon notice to the Department and to the conservation commission.
5. Upon a negative Determination of Applicability by the Department, work may proceed at the owner's risk even if a request for an adjudicatory hearing has been made.

6. Upon a negative Determination of Applicability by the Commissioner after an adjudicatory hearing, work may proceed at the owner's risk even if a petition for judicial review has been filed.

7. Upon a positive Determination of Applicability by a conservation commission, the Department, or the Commissioner which identifies the scope of alternatives to be evaluated under 310 CMR 10.58(4)(c)2. for work within the riverfront area, work may not proceed until a Notice of Intent has been filed and a final Order has been issued and recorded and all administrative appeal periods have elapsed.

(4) Notices of Intent.

(a) Any person who proposes to do work that will remove, fill, dredge or alter any Area Subject to Protection Under M.G.L. c. 131 § 40 shall file a Notice of Intent on Form 3 and other application materials in accordance with the submittal requirements set forth in the *General Instructions for Completing Notice of Intent (Form 3) and Abbreviated Notice of Intent (Form 4)*. **An applicant shall obtain written permission from the landowner(s) prior to filing a Notice of Intent for proposed work.** Two copies of the completed Notice of Intent with supporting plans and documents shall be sent by certified mail or hand delivery to the conservation commission, and two copies of the same shall be sent concurrently in like manner to the Department.

Concurrent with the filing of the Notice of Intent, the applicant also shall provide notification to all abutters and any property owner within 100 feet of the property line of the land where the activity is proposed if separated from that land by a public or private street or a body of water. The applicant shall provide notification at the mailing addresses shown on the most recent applicable tax list from the municipal assessor. Notification shall be at the applicant's expense. The notification shall state where copies of the Notice of Intent may be examined or obtained and where information on the date, time, and location of the public hearing may be obtained. To ensure compatibility with local procedures, applicants must comply with any rules of the local conservation commission on the location for examining or obtaining the Notice of Intent and information about the hearing. An affidavit and copies of the notification shall be filed with the conservation commission as proof of compliance. The conservation commission shall determine whether the applicant has complied with abutter notification requirements. The determination of the conservation commission shall be final. The Department will dismiss Requests for Action based on allegations of failure to comply with abutter notification requirements.

(b) For certain purposes, other forms of Notices may be used.

1. For certain projects, applicants may at their option use the Abbreviated Notice of Intent. This latter form may only be used when all three of the following circumstances exist:

- a. the proposed work is within the Buffer Zone, as defined in 310 CMR 10.04, or within Land Subject to Flooding, as defined in 310 CMR 10.57(2) or within the Riverfront Area, as defined in 310 CMR 10.58.
- b. the proposed work will disturb less than 1000 square feet of surface area within the Buffer Zone and/or Land Subject to Flooding or less than 1000 square feet of riverfront area, provided the work conforms to 310 CMR 10.58(4)(c)2.a..
- c. the proposed work will not require U.S. Army Corps of Engineer Section 10 or Section 404 permits, or a license from the Division of Waterways pursuant to M.G.L. c. 91.

2. To establish the extent of bordering vegetated wetland and other resource areas on land subject to protection under M.G.L. c. 131, § 40, applicants may use the Abbreviated Notice of Resource Area Delineation for the confirmation of a delineated boundary of bordering vegetated wetlands and other resource areas on the site, prior to filing a Notice of Intent for proposed work. Alternatively, the boundary of bordering vegetated wetland (or other resource areas) may be determined through the filing of a Notice of Intent.

3. To confirm the boundaries of resource areas and certify that the requirements of 310 CMR 10.02(2)(b)ii. will be met for activities in the buffer zone, applicants shall use the Abbreviated Notice of Resource Area Delineation.

(e) The requirement under M.G.L. c. 131, § 40 to obtain or apply for all obtainable permits,

variances and approvals required by local by-law with respect to the proposed activity shall mean only those which are feasible to obtain at the time the Notice of Intent is filed. Permits, variances, and approvals required by local by-law may include, among others, zoning variances, permits from boards of appeals, permits required under floodplain or wetland zoning by-laws and gravel removal permits. They do not include, among others, building permits under the State Building Code, M.G.L. c. 23B, § 16, or subdivision control approvals under the State Subdivision Control Law, M.G.L. c. 41, §§ 81K through 81GG, which are issued by local authorities. When an applicant for a comprehensive permit (under M.G.L. c. 40B, §§ 20 through 23) from a board of appeals has received a determination from the board granting or denying the permit and, in the case of a denial, has appealed to the Housing Appeals Committee (established under M.G.L. c. 23B, § 5A), said applicant shall be deemed to have applied for all permits obtainable at the time of filing.

(f) If the issuing authority rejects a Notice of Intent because of a failure to obtain or apply for all permits, variances and approvals required by local by-law, it shall specify in writing the permit, variance or approval that has not been applied for. A ruling by the municipal agency within whose jurisdiction the issuance of the permit, variance or approval lies, or by the town counsel or city solicitor, concerning the applicability or obtainability of such permit, variance or approval shall be accepted by the issuing authority. In the absence of such a ruling, other evidence may be accepted.

(g) A Notice of Intent shall expire where the applicant has failed to diligently pursue the issuance of a Final Order in proceedings under 310 CMR 10.00. A Notice of Intent shall be presumed to have expired two years after the date of filing unless the applicant submits information showing that (a) good cause exists for the delay of proceedings under 310 CMR 10.00; and (b) the applicant has continued to pursue the project diligently in other forums in the intervening period; provided, however, that unfavorable financial circumstances shall not constitute good cause for delay. No Notice of Intent shall be deemed expired under 310 CMR 10.05 when an adjudicatory hearing is pending and when the applicant has provided all information necessary to continue with the prosecution of the case. Notwithstanding the provisions contained in 310 CMR 10.10, 310 CMR 10.05(4)(g) shall apply to any Notice of Intent whenever filed.

(h) The issuing authority may require that supporting plans and calculations be prepared and stamped by a registered professional engineer (PE) when, in its judgment, the complexity of the proposed work warrants this professional certification. The issuing authority may also require the preparation of supporting materials by other professionals including, but not limited to, registered landscape architect, registered land surveyor, environmental scientist, geologist or hydrologist when in its judgment the complexity of the proposed work warrants the relevant specialized expertise. **The issuing authority may require a delineation or a certification under 310 CMR 10.02(2)(b)ii in a Notice of Resource Area Delineation to be performed by a professional with relevant specialized expertise.**

(5) Public Hearings by Conservation Commissions.

(a) A public hearing shall be held by the conservation commission within 21 days of receipt of the minimum submittal requirements set forth in the *General Instructions for Completing Notice of Intent (Form 3)* and *Abbreviated Notice of Intent (Form 4)*, and shall be advertised in accordance with M.G.L. c. 131, § 40 and the requirements of the open meeting law, M.G.L. c. 39, § 23B.

(b) Public hearings may be continued as follows:

1. without the consent of the applicant to a date, announced at the hearing, within 21 days, of receipt of the Notice of Intent;
2. with the consent of the applicant, to an agreed-upon date, which shall be announced at the hearing; or
3. with the consent of the applicant for a period not to exceed 21 days after the submission of a specified piece of information or the occurrence of a specified action. The date, time and place of said continued hearing shall be publicized in accordance with M.G.L. c. 131, § 40, and notice shall be sent to any person at the hearing who so requests in writing.

(6) Orders of Conditions Regulating Work and Orders of Resource Area Delineation.

1. make a determination that the area on which the work is proposed to be done, or which the proposed work will remove, fill, dredge or alter, is not significant to any of the interests identified in M.G.L. c. 131, § 40, and shall so notify the applicant and the Department on Form 6;
2. make a determination that the area on which the work is proposed to be done, or which the proposed work will remove, fill, dredge or alter, is significant to one or more of the interests identified in M.G.L. c. 131, § 40, and shall issue an Order of Conditions for the protection of said interest(s), on Form 5; or
3. make a determination that bordering vegetated wetland and other resource areas subject to jurisdiction have been identified and delineated according to the definitions in 310 CMR 10.00 and shall issue an Order of Resource Area Delineation to confirm or modify the delineations submitted. The Order of Resource Area Delineation shall be effective for three years.

The standards and presumptions to be used by the issuing authority in determining whether an area is significant to the interests identified in M.G.L. c. 131, § 40 are found in 310 CMR 10.21 through 10.37 (for coastal wetlands) and 310 CMR 10.51 through 10.60 (for inland wetlands).

(b) The Order of Conditions shall impose such conditions as are necessary to meet the performance standards set forth in 310 CMR 10.21 through 10.60 for the protection of those areas found to be significant to one or more of the interests identified in M.G.L. c. 131, § 40. The Order shall prohibit any work or any portion thereof that cannot be conditioned to meet said standards.

The Order shall impose conditions only upon work or the portion thereof that is to be undertaken within an Area Subject to Protection Under M.G.L. c. 131, § 40 or within the Buffer Zone. The Order shall impose conditions setting limits on the quantity and quality of discharge from a point source (both closed and open channel), when said limits are necessary to protect the interests identified in M.G.L. c. 131, § 40; provided, however, that the point of discharge falls within an Area Subject to Protection Under M.G.L. c. 131, § 40 or within the Buffer Zone, and further provided that said conditions are consistent with the limitations set forth in 310 CMR 10.03(4). **Stormwater shall be managed according to standards established by the Department in its Stormwater Policy.** The Order shall impose conditions to control erosion and sedimentation within resource areas and the Buffer Zone.

Notwithstanding the foregoing, when the issuing authority has determined that an activity outside the Areas Subject to Protection Under M.G.L. c. 131, § 40 and outside the Buffer Zone has in fact altered an Area Subject to Protection Under M.G.L. c. 131, § 40, it shall impose such conditions on any portion of the activity as are necessary to contribute to the protection of the interests identified in M.G.L. c. 131, § 40.

(c) If the conservation commission finds that the information submitted by the applicant is not sufficient to describe the site, the work or the effect of the work on the interests identified in M.G.L. c. 131, § 40, it may issue an Order prohibiting the work. The Order shall specify the information which is lacking and why it is necessary.

(d) Except as provided in M.G.L. c. 131, § 40 for maintenance dredging, an Order of Conditions, Order of Resource Area Delineation, or Notification of Non-Significance shall be valid for three years from the date of its issuance; provided, however, that the issuing authority may issue an Order for up to five years where special circumstances warrant and where those special circumstances are set forth in the Order. **An Order of Resource Area Delineation shall be valid for three years, and may be extended by the issuing authority for one or more years up to three years each under 310 CMR 10.05(8) upon written confirmation by a professional with relevant expertise that the resource area delineations remain accurate.**

(e) The Order or Notification of Non-Significance shall be signed by a majority of the conservation commission and shall be mailed by certified mail (return receipt requested) or hand delivered to the applicant or his agent or attorney, and a copy mailed or hand delivered at the same time to the Department. If the Order imposes conditions necessary to meet any performance standard contained in 310 CMR 10.37 or 10.59, a copy shall be mailed or hand delivered at the same time to the Massachusetts Natural Heritage and Endangered Species Program.

(f) A copy of the plans describing the work and the Order shall be kept on file by the conservation commission and by the Department, and shall be available to the public at

(g) Prior to the commencement of any work permitted or required by the Final Order or Notification of Non-Significance, the Order or Notification shall be recorded in the Registry of Deeds or the Land Court for the district in which the land is located, within the chain of title of the affected property. In the case of recorded land, the final order shall also be noted in the Registry's Grantor Index under the name of the owner of the land upon which the proposed work is to be done. In the case of registered land, the final order shall also be noted on the Land Court Certificate of Title of the owner of the land upon which the proposed work is to be done. Certification of recording shall be sent to the issuing authority on the form at the end of Form 5. If work is undertaken without the applicant first recording the Order, the issuing authority may issue an Enforcement Order (Form 9) or may itself record the Order of Conditions.

(h) Notwithstanding the provisions contained in 310 CMR 10.10(1) and (3), any Order of Conditions not containing an expiration date, issued for work proposed in a Notice of Intent filed under M.G.L. c. 131, § 40 prior to November 18, 1974, shall expire on April 17, 1986.

(i) An Order of Conditions does not grant any property rights or any exclusive privileges; it does not authorize any injury to private property or invasion of property rights.

(j) Failure to comply with conditions stated in the Order and with all related statutes and other regulatory measures shall be deemed cause to revoke or modify the Order of Conditions.

(7) Requests for Actions by the Department (Appeals).

(a) The following persons may request the Department to act:

1. the applicant;
2. the owner, if not the applicant;
3. any person aggrieved by a [Determination](#) or an Order;
4. any owner of land abutting the land on which the work is to be done;
5. any ten residents of the city or town where the land is located; and
6. the Department.

(b) Any person(s) permitted to request the Department to act under 310 CMR 10.05(7)(a) may request the Department to issue a Superseding Determination of Applicability or to issue a Superseding Order, whichever is appropriate, whenever a conservation commission has:

1. issued a Determination of Applicability (Form 2);
2. issued a Notification that an area is not significant to any interest identified in M.G.L. c. 131, § 40 (Form 6);
3. issued an Order of Conditions allowing, conditioning or prohibiting work (Form 5) or an [Order of Resource Area Delineation](#); or
4. failed to hold a public hearing or issue an Order, Notification or Determination within the time period required by M.G.L. c. 131, § 40.

Where the Department is requested to issue a Superseding Determination or Order of Conditions, the conservation commission shall be a party to all agency proceedings and hearings before the Department.

(c) A request for a Superseding Order or Determination shall be made in writing and shall be sent by certified mail or hand delivered within ten days of issuance of the Order, Determination or Notification which is being appealed. When the basis of such request is the conservation commission's failure to act, the request may be made at any time up to 70 days after the expiration of the period within which the conservation commission was to have acted. Said request shall state clearly and concisely the objections to the Order, Determination or Notification which is being appealed and, in the case of a request for a Superseding Order, how the Order of Conditions or Notification of Non-Significance issued by the conservation commission is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in M.G.L. c. 131, § 40.

(d) All requests for the Department to act shall be sent to the appropriate Regional Office of the Department. A copy of the request shall at the same time be sent by certified mail or hand delivered to the conservation commission and the applicant, if he is not the appellant.

(e) Within 35 days from receipt of such a request, the Department shall issue a Superseding Determination of Applicability (Form 2) or a Notification that an area is not significant to any interest identified in M.G.L. c. 131, § 40 (Form 6).

- (f) Within 70 days from receipt of such a request, the Department shall issue a Superseding Order unless either of the following apply, or in the event that both apply, whichever is later:
1. compliance with M.G.L. c. 30, §§ 6 through 62H and 301 CMR 11.00 is required, in which case the Department shall issue a Superseding Order within 40 days of the issuance of a statement by the Secretary of the Executive Office of Environmental Affairs that the applicant has complied with M.G.L. c. 30, §§ 6 through 62H and 301 CMR 11.00;
 2. the Department has requested additional plans, information or documentation pursuant to 310 CMR 10.05(7)(g), in which case the Department shall issue a Superseding Order within 40 days of receipt of such plans, information, or documentation, or of the failure of the applicant to comply with such request.
- (g) The Department shall notify the applicant within 30 days of receipt of a request for the Department to act if additional information or documentation is necessary to make its determination; provided, however, that further information may be requested should the information supplied in response to the original notification so require. **When the request for a Superseding Order of Resource Area Delineation concerns an Order establishing the extent of resource areas and the buffer zone, the Department shall limit its review to the resource area delineations. The Department shall consider the objections to the resource area delineations stated in the request. The Department may affirm an Order of Resource Area Delineation based upon information in the Request or Notice of Resource Area Delineation when certified as true and complete by a professional with relevant specialized expertise. The Department may affirm an Order of Resource Area Delineation based upon a conclusion that the Order of Resource Area Delineation substantially conforms to the locations identified by the Department through a site inspection.**
- (h) When the request for a Superseding Order concerns an Order prohibiting work and issued pursuant to 310 CMR 10.05(6)(c), the Department shall limit its review to the information submitted to the conservation commission. If the Department determines that insufficient information was submitted, it shall affirm the denial and instruct the applicant to refile with the conservation commission and include the appropriate information. If the Department determines that sufficient information was submitted, it shall so inform the applicant and the conservation commission, and shall proceed to issue a Superseding Order as provided in 310 CMR 10.05.
- (i) After receipt of a request for a Superseding Determination or Order, the Department ~~shall~~ **may** conduct an informal meeting, ~~which shall include an~~ and may conduct an inspection of the site, ~~to which. In the event an inspection is conducted,~~ all parties shall be invited in order to present any information necessary or useful to a proper and complete review of the proposed activity and its effects upon the interests identified in M.G.L. c. 131, § 40. Any party presenting information as a result of such a meeting shall provide copies to the other parties. ~~If the Department determines that an inspection of the site is not necessary or useful to a proper and complete review, it shall set forth its reasons in writing to all parties.~~ Based upon its review of the Notice of Intent, the Order, ~~the any~~ informal meeting ~~and or~~ site inspection, and any other additional plans, information, or documentation submitted under 310 CMR 10.05(7)(f) or (g), the Department may issue a Superseding Order which affirms the Order issued by the conservation commission.
- (j) **After issuance by the Department of a Superseding Order or Superseding Determination, the applicant or landowner, the conservation commission, any person aggrieved if previously a participant in the permit proceedings, and any ten residents if previously a participant in the permit proceedings may request an adjudicatory hearing. Previous participation in the permit proceeding means the submission of written information to the conservation commission prior to close of the public hearing, requesting a Superseding Order or Determination, or providing written information to the Department prior to issuance of a Superseding Order or Determination. After issuance by the Department of a Superseding Order or a Superseding Determination, any person specified in 310 CMR 10.05(7)(a), whether or not previously a participant in the proceedings, or any ten persons pursuant to M.G.L. c. 30A, § 10A, may request an adjudicatory hearing.** The request for a hearing must be sent to the Department by certified mail or hand delivered within ten days after the date of issuance of the Superseding Order or Superseding Determination, and a copy thereof must at the same time be sent by certified

mail or hand delivered to the conservation commission, the applicant and any other parties. Said request shall

state clearly and concisely the facts of the proceeding, the reasons the Superseding Order or Superseding Determination is alleged to be inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in M.G.L. c. 131, § 40, and the relief sought through the adjudicatory hearing including specifically the changes desired in the Superseding Order; the Department Wetlands File Number, name of the applicant and address of the project; the complete name, address, telephone and telefax (if any) numbers of the party filing the request, and, if represented by counsel, the name, address, telephone and telefax (if any) numbers of the attorney; the names, addresses, telephone and telefax (if any) numbers of all other parties, if known; and a statement that a copy of the request has been sent to the applicant, the conservation commission and each other party or representative of such party, if known. **In addition, any person requesting an adjudicatory hearing must include with the notice of claim sufficient written facts to demonstrate status as a person aggrieved or a ten residents group, and documentation to demonstrate previous participation.** Failure to submit all necessary information may result in a dismissal by the Department of the request for Adjudicatory Hearing. The request shall be addressed to the Docket Clerk, ~~Office of General Counsel~~, at the Department's offices in Boston. **Any ten persons may intervene in an adjudicatory proceeding pursuant to M.G.L. c. 30A, § 10A. The Department will, upon request of the applicant, withdraw or stay action on a Superseding Determination of Applicability or Superseding Order of Resource Area Delineation pending submission of a Notice of Intent and issuance of an Order of Conditions, or alternately, the Department shall vacate its Superseding Determination or Order if the applicant withdraws the Request for Determination or Notice of Resource Area Delineation, unless the Department provides notice to all parties within ten days of receipt of the withdrawal that the proceeding will continue. The Department may designate a factfinder for appeals under 310 CMR 1.01.**

(k) No work shall be undertaken until all administrative appeal periods from an Order or Notification of Non-Significance have elapsed or, if such an appeal has been taken, until all proceedings before the Department have been completed.

(8) Extensions of Orders of Conditions.

(a) The issuing authority may extend an Order for one or more periods of up to three years each, which shall be made on Form 7. The request for an extension shall be made to the issuing authority at least 30 days prior to expiration of the Order.

(b) The issuing authority may deny the request for an extension and require the filing of a new Notice of Intent for the remaining work [or a new Notice of Resource Area Delineation](#) in the following circumstances:

1. where no work has begun on the project, except where such failure is due to an unavoidable delay, such as appeals, in the obtaining of other necessary permits;

2. where new information, not available at the time the Order was issued, has become available and indicates that the Order is not adequate to protect the interests identified in M.G.L. c. 131, § 40; or

3. where incomplete work is causing damage to the interests identified in M.G.L. c. 131, § 40; or

4. where work has been done in violation of the Order or 310 CMR 10.00.

[5. where a resource area delineation or certification under 310 CMR 10.02 \(2\)\(b\)ii. in an Order of Resource Delineation is no longer accurate.](#)

(c) If issued by the conservation commission, the Extension Permit shall be signed by a majority of the commission. A copy of the Extension Permit shall be sent to the conservation commission or the Department, whichever is appropriate, by the issuing authority.

(d) The Extension Permit shall be recorded in the Land Court or the Registry of Deeds, whichever is appropriate. Certification of recording shall be sent to the issuing authority on the form at the end of Form 7. If work is undertaken without the applicant so recording the Extension Permit, the issuing authority may issue an Enforcement Order (Form 9) or may itself record the Extension Permit.

(9) Certificates of Compliance.

(a) Upon completion of the work described in a Final Order of Conditions, the applicant shall request in writing the issuance of a Certificate of Compliance stating that the work has been satisfactorily completed. Upon written request by the applicant, a Certificate of Compliance shall be issued by the issuing authority within 21 days of receipt thereof, and shall certify on Form 8 that the activity or portions thereof described in the Notice of Intent and plans has been completed in compliance with the Order. If issued by the Conservation Commission, the Certificate of Compliance shall be signed by a majority of the commission.

A copy of the Certificate of Compliance shall be sent to the conservation commission or the Department, whichever is appropriate, by the issuing authority.

(b) Prior to the issuance of a Certificate of Compliance, a site inspection shall be made by the issuing authority, in the presence of the applicant or the applicant's agent. If the Department is the issuing authority, it shall notify the conservation commission of the request and the date of the site inspection.

(c) If the issuing authority determines, after review and inspection, that the work has not been done in compliance with the Order, it may refuse to issue a Certificate of Compliance. Such refusal shall be issued within 21 days of receipt of a request for a Certificate of Compliance, shall be in writing and shall specify the reasons for denial.

(d) If a project has been completed in accordance with plans stamped by a registered professional engineer, architect, landscape architect or land surveyor, a written statement by such a professional person certifying substantial compliance with the plans and setting forth what deviation, if any, exists from the plans approved in the Order shall accompany the request for a Certificate of Compliance.

(e) If the final order contains conditions which continue past the completion of the work, such as maintenance or monitoring, the Certificate of Compliance shall specify which, if any, of such conditions shall continue. The Certificate shall also specify to what portions of the work it applies, if it does not apply to all the work regulated by the Order.

(f) The Certificate of Compliance shall be recorded in the Land Court or Registry of Deeds, whichever is appropriate. Certification of recording shall be sent to the issuing authority on the form at the end of Form 8. Upon failure of the applicant to so record, the issuing authority may do so.

(10) Variance.

(a) The Commissioner may waive the application of any regulation(s) in 310 CMR 10.21

1. there are no reasonable conditions or alternatives that would allow the project to proceed in compliance with 310 CMR 10.21 through 10.60;
 2. that mitigating measures are proposed that will allow the project to be conditioned so as to contribute to the protection of the interests identified in M.G.L. c. 131, § 40; and
 3. that the variance is necessary to accommodate an overriding community, regional, state or national public interest; or that it is necessary to avoid an Order that so restricts the use of property as to constitute an unconstitutional taking without compensation.
- (b) Procedure. A request for a variance shall be made in writing and shall include, at a minimum, the following information:
1. a description of alternatives explored that would allow the project to proceed in compliance with 310 CMR 10.21 through 10.60 and an explanation of why each is unreasonable;
 2. a description of the mitigating measures to be used to contribute to the protection of the interests identified in M.G.L. c. 131, § 40; and
 3. evidence that an overriding public interest is associated with the project which justifies waiver of 310 CMR 10.21 through 10.60, or evidence that the Superseding Order so restricts the use of the land that it constitutes an unconstitutional taking without compensation.

The request for a variance shall be sent to the Department by certified mail or hand delivered and a copy thereof shall at the same time be sent by certified mail or hand delivered to the conservation commission and any other parties.

The Department will place a notice in the Environmental Monitor published by the Massachusetts Environmental Policy Act Program of the Executive Office of Environmental Affairs to solicit public comments on the request. The Department may conduct a public hearing or an adjudicatory hearing on the request. After reviewing the information submitted with the request for a variance and any other information submitted by any party within the public comment period, the Commissioner shall issue a decision as to whether to grant the request.

After reviewing the information submitted with the request for a variance and any other information submitted by any party within 21 days of the request, the Commissioner shall issue a decision as to whether to grant the request.

Within ten days of the date of issuance of the Commissioner's decision on the variance, any person specified in 310 CMR 10.05(7)(j) may, according to the procedures specified in that section, request an adjudicatory hearing on the decision. At the adjudicatory hearing, the applicant has the burden of demonstrating that the project meets the criteria necessary for a variance. Other parties to the adjudicatory hearing may introduce evidence either in favor of or opposing the request for a variance.

For projects in which all of the proposed work will be undertaken on land within the boundaries of one city or town, the request for a variance shall not be filed until the applicant first files a Notice of Intent with the Conservation Commission. The Commission shall review the project in accordance with the procedures set forth in 310 CMR 10.01 through 10.10 and issue an Order of Conditions consistent with 310 CMR 10.21 through 10.60. Within ten days of the issuance of the Order of Conditions, the applicant may request the Department to issue a Superseding Order. The Department staff shall review the project in accordance with the procedures set forth in 310 CMR 10.01 through 10.10 and shall issue a Superseding Order consistent with the provisions of 310 CMR 10.21 through 10.60. Within ten days of the issuance of the Superseding Order, the applicant may request an adjudicatory hearing on that order and/or a variance under 310 CMR 10.05(10) according to the procedure previously described.

For projects in which the proposed work will be undertaken on land within the boundaries of more than one city or town, the applicant may file a request for a variance directly with the Commissioner, with a copy to each affected conservation commission. If, after public notice, the Commissioner finds that a project meets the variance criteria, he shall specify which regulation(s) has been waived and what general requirements or conditions must be met to satisfy the above-stated variance criteria. The applicant shall then file a Notice of Intent with the appropriate conservation commissions in accordance with the procedures contained in 310 CMR 10.01 through 10.10. The conservation commissions shall issue Orders of Conditions consistent with all provisions of 310 CMR 10.21 through 10.60 except those waived by the Commissioner and containing any additional conditions or requirements imposed by the Commissioner in the variance. The usual procedures contained

10.06: continued

(7) Notwithstanding any other requirement of 310 CMR 10.06, Immediate Response Actions receiving oral approval from the Bureau of Waste Site Cleanup (BWSC) of the Department of Environmental Protection pursuant to 310 CMR 40.0420(2), or initiated up to 24 hours prior to notification to and oral approval by BWSC pursuant to 310 CMR 40.0420(7) and (8), may commence before requesting the conservation commission to issue an emergency certification under 310 CMR 10.06, so long as such request is made within 24 hours after BWSC has orally approved commencement of the Immediate Response Action. Once a request for emergency certification has been made pursuant to 310 CMR 10.06(7), work that commenced before such filing may continue pending a decision on the request by the conservation commission. Such work may also continue pending a decision on a request for Departmental review unless the request has not been filed with the Department within one business day of: issuance by the conservation commission of the emergency certification; denial by a conservation commission of the emergency certification; or failure by a conservation commission to act within 24 hours of a request for emergency certification.

10.07: Compliance with the M.G.L. c. 30, §§ 61 through 62H

(1) The Massachusetts Environmental Policy Act, M.G.L. c. 30, §§ 61 through 62H, may require an applicant to file an Environmental Notification Form (ENF) and possibly an Environmental Impact Report (EIR) for the proposed work, prior to the Department's issuance of a Superseding Order. *See* 301 CMR 11.00: *MEPA Regulations*.

(2) If said filing is required, the Department shall so notify the applicant upon receipt of the request for the Department to act. If within 70 days of the request for the Department to act the applicant has not filed an ENF, the Department may issue a Superseding Order prohibiting the project; provided, however, that such an order shall not issue if the Executive Office of Environmental Affairs determines that the filing of an ENF is not required.

(3) In determining total surface area for purposes of the M.G.L. c. 30, §§ 6 through 62H wetlands threshold set forth in 301 CMR 11.25(2) and 11.26(7)(a), only those portions of the Areas Subject to Protection Under M.G.L. c. 131, § 40 specified in 310 CMR 10.02(1), not including the Buffer Zone, which will be removed, filled, dredged or altered shall be considered.

10.08: Enforcement Orders

(1) When the conservation commission, the Department or the Division of Law Enforcement of the Department of Fisheries and ~~Game Wildlife and Environmental Law Enforcement (DLE)~~ (DFG) determines that an activity is in violation of M.G.L. c. 131, § 40, 310 CMR 10.00 or a Final Order, the conservation commission, Department or the ~~DLE~~FG may issue an Enforcement Order ~~on Form 9~~. Violations include, ~~but are not limited to~~:

- (a) failure to comply with a Final Order or Final Determination, such as failure to observe a particular condition or time period specified in the Order;
- (b) failure to complete work described in a Final Order or Final Determination, when such failure causes damage to the interests identified in M.G.L. c. 131, § 40; or
- (c) failure to obtain a valid Final Order or Extension Permit prior to conducting an Activity Subject to Regulation Under M.G.L. c. 131, § 40 as defined in 310 CMR 10.02(2).
- (d) making any false, inaccurate, or incomplete statements in any certification filed under 310 CMR 10.00.**
- (e) failure to comply with any certification.**
- (f) leaving in place unauthorized fill or otherwise fail to restore illegally altered land to its original condition, or the continuation of any other activity in violation of M.G.L. c. 131, s. 40.**

The conservation commission, its members and agents, and Department employees may enter upon privately owned land for the purpose of performing their duties under M.G.L. c. 131, s. 40.

(2) A Final Order may be enforced by either the conservation commission or the Department regardless of which is the issuing authority. The members, officers, employees and agents of the conservation commission and the Department may enter upon privately owned land for the purpose of performing their duties under M.G.L. c. 131, § 40 and 310 CMR 10.00.

310 CMR 10.51 through 10.60 is intended to ensure coordination between the divisions of the Department and between the Department and other EOEA agencies; and to ensure consideration by the Department of relevant policies, laws or programs of other EOEA agencies.

310 CMR 10.51 through 10.60 is, in addition, intended to be consistent with and form a part of the Commonwealth's Coastal Zone Management Program as it has been promulgated and defined by 301 CMR 21.00 issued pursuant to M.G.L. c. 21A and entitled "Establishment of the Coastal Zone Management Program by the Executive Office of Environmental Affairs". 310 CMR 10.51 through 10.60, however, is adopted independently under M.G.L. c. 131, § 40 and would remain in full force and effect in the absence of 301 CMR 21.00.

310 CMR 10.51 through 10.60 is intended to notify both persons proposing work in Areas Subject to Protection Under M.G.L. c. 131, § 40 and those regulating that work as to the performance standards that should be applied. These standards are intended to identify the level of protection that the issuing authority must impose in order to contribute to the protection of the interests identified in M.G.L. c. 131, § 40. It is the responsibility of the person proposing work to design and complete his project in conformance with these performance standards. It is the responsibility of the issuing authority to impose such conditions on a proposed project as to ensure that the project is designed and completed in a manner consistent with these standards.

10.53: General Provisions

(1) If the issuing authority determines that a resource area is significant to an interest identified in M.G.L. c. 131, § 40 for which no presumption is stated in the Preamble to the applicable section, the issuing authority shall impose such conditions as are necessary to contribute to the protection of such interests. **For work in the buffer zone subject to review under 310 CMR 10.02(2)(b)iii, the issuing authority shall impose conditions to protect the interests of the Act identified for the adjacent resource area. The potential for adverse impacts to resource areas from work in the buffer zone may increase with the extent of the work and the proximity to the resource area. The issuing authority may consider the characteristics of the buffer zone, such as the presence of steep slopes, that may increase the potential for adverse impacts on resource areas. Conditions may include limitations on the scope and location of work in the buffer zone as necessary to avoid alteration of resource areas. The issuing authority may require erosion and sedimentation controls during construction, a clear limit of work, and the preservation of natural vegetation adjacent to the resource area and/or other measures commensurate with the scope and location of the work within the buffer zone to protect the interests of the Act. The purpose of preconstruction review of work in the buffer zone is to ensure that adjacent resource areas are not adversely affected during or after completion of the work.**

(2) When the site of a proposed project is subject to a Restriction Order which has been duly recorded under the provisions of M.G.L. c. 131, § 40A, such a project shall conform to both the provisions contained in that Order and 310 CMR 10.51 through 10.60.

(3) Notwithstanding the provisions of 310 CMR 10.54 through 10.58 and 10.60, the issuing authority may issue an Order of Conditions and impose such conditions as will contribute to the interests identified in M.G.L. c. 131, § 40 permitting the following limited projects (although no such project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.59). In the exercise of this discretion, the issuing authority shall consider the magnitude of the alteration and the significance of the project site to the interests identified in M.G.L. c. 131, § 40, the availability of reasonable alternatives to the proposed activity, the extent to which adverse impacts are minimized, and the extent to which mitigation measures, including replication or restoration, are provided to contribute to the protection of the interests identified in M.G.L. c. 131, § 40.

(a) Work on land to be used primarily and directly in the raising of animals, including but not limited to dairy cattle, beef cattle, poultry, sheep, swine, horses, ponies, mules, goats, bees and fur-bearing animals or on land to be used in a related manner which is incidental thereto and represents a customary and necessary use in raising such animals; and work on land to be used primarily and directly in the raising of fruits, vegetables, berries, nuts and

(3) Presumption. Where a proposed activity involves the removing, filling, dredging or altering of a Bordering Vegetated Wetland, the issuing authority shall presume that such area is significant to the interests specified in 310 CMR 10.55(1). This presumption is rebuttable and may be overcome upon a clear showing that the Bordering Vegetated Wetland does not play a role in the protection of said interests. In the event that the presumption is deemed to have been overcome, the issuing authority shall make a written determination to this effect, setting forth its grounds (Form 6).

(4) General Performance Standards.

(a) Where the presumption set forth in 310 CMR 10.55(3) is not overcome, any proposed work in a Bordering Vegetated Wetland shall not destroy or otherwise impair any portion of said area.

(b) Notwithstanding the provisions of 310 CMR 10.55(4)(a), the issuing authority may issue an Order of Conditions permitting work which results in the loss of up to 5000 square feet of Bordering Vegetated Wetland when said area is replaced in accordance with the following general conditions and any additional, specific conditions the issuing authority deems necessary to ensure that the replacement area will function in a manner similar to the area that will be lost:

1. the surface of the replacement area to be created ("the replacement area") shall be equal to that of the area that will be lost ("the lost area");
2. the ground water and surface elevation of the replacement area shall be approximately equal to that of the lost area;
3. The overall horizontal configuration and location of the replacement area with respect to the bank shall be similar to that of the lost area;
4. the replacement area shall have an unrestricted hydraulic connection to the same water body or waterway associated with the lost area;
5. the replacement area shall be located within the same general area of the water body or reach of the waterway as the lost area;
6. at least 75% of the surface of the replacement area shall be reestablished with indigenous wetland plant species within two growing seasons, and prior to said vegetative reestablishment any exposed soil in the replacement area shall be temporarily stabilized to prevent erosion in accordance with standard U.S. Soil Conservation Service methods; and
7. the replacement area shall be provided in a manner which is consistent with all other General Performance Standards for each resource area in Part III of 310 CMR 10.00.

In the exercise of this discretion, the issuing authority shall consider the magnitude of the alteration and the significance of the project site to the interests identified in M.G.L. c. 131, § 40, the extent to which adverse impacts can be avoided, the extent to which adverse impacts are minimized, and the extent to which mitigation measures, including replication or restoration, are provided to contribute to the protection of the interests identified in M.G.L. c. 131, § 40.

(c) Notwithstanding the provisions of 310 CMR 10.55(4)(a), the issuing authority may issue an Order of Conditions permitting work which results in the loss of a portion of Bordering Vegetated Wetland when;

1. said portion has a surface area less than 500 square feet;
2. said portion extends in a distinct linear configuration ("finger-like") into adjacent uplands; and
3. in the judgment of the issuing authority it is not reasonable to scale down, redesign or otherwise change the proposed work so that it could be completed without loss of said wetland.

(d) Notwithstanding the provisions of 310 CMR 10.55(4)(a),(b) and (c), no project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.59.

(e) Any proposed work shall not destroy or otherwise impair any portion of a Bordering Vegetated Wetland that is within an Area of Critical Environmental Concern designated by the Secretary of Environmental Affairs under M.G.L. c. 21A, § 2(7) and 301 CMR 12.00. This 310 CMR 10.55(4)(e):

- ii. When the USGS StreamStats method cannot be used because the stream does not have a mapped and digitized centerline (including but not limited to streams located in the following basins: North Coastal Basin, Taunton Basin, Buzzards Bay Basin, Cape Cod and Islands Basin, and that portion of the South Coastal Basin that is south of the Jones River sub-basin), and the stream has a watershed size of at least one-half (0.50) square mile, and the surficial geology of the contributing drainage area to the stream at the project site contains 75% or more stratified drift, the issuing authority shall find such streams to be perennial. Stratified drift shall mean sand and gravel deposits that have been layered and sorted by glacial meltwater streams. Areal percentages of stratified drift may be determined using USGS surficial geologic maps, USGS Hydrological Atlases, Massachusetts Geographical Information System (MassGIS) surficial geology data layer, or other published or electronic surficial geological information from a credible source.
- d. Notwithstanding 310 CMR 10.58(2)(a)1.a. through c., the issuing authority shall find that any stream is intermittent based upon a documented field observation that the stream is not flowing. A documented field observation shall be made by a competent source and shall be based upon an observation made at least once per day, over four days in any consecutive 12 month period, during a non-drought period on a stream not significantly affected by drawdown from withdrawals of water supply wells, direct withdrawals, impoundments, or other man-made flow reductions or diversions. Field observations made after December 20, 2002 shall be documented by field notes and by dated photographs or video. Field observations made prior to December 20, 2002 shall be documented by credible evidence. All field observations shall be submitted to the issuing authority with a statement signed under the penalties of perjury attesting to the authenticity and veracity of the field notes, photographs or video and other credible evidence. Department staff, conservation commissioners, and conservation commission staff are competent sources; issuing authorities may consider evidence from other sources that are determined to be competent.
- e. Rivers include the entire length and width to the mean annual high-water line of the major rivers (Assabet, Blackstone, Charles, Chicopee, Concord, Connecticut, Deerfield, Farmington, French, Hoosic, Housatonic, Ipswich, Merrimack, Millers, Nashua, Neponset, Parker (Essex County), Quinebaug, Shawsheen, Sudbury, Taunton, Ten Mile, and Westfield).
- f. Rivers include perennial streams that cease to flow during periods of extended drought. Periods of extended drought for purposes of 310 CMR 10.00 shall be those periods, in those specifically identified geographic locations, determined to be at the "Advisory" or more severe drought level by the Massachusetts Drought Management Task Force, as established by the Executive Office of Environmental Affairs and the Massachusetts Emergency Management Agency in 2001, in accordance with the Massachusetts Drought Management Plan (MDMP). Rivers and streams that are perennial under natural conditions but are significantly affected by drawdown from withdrawals of water supply wells, direct withdrawals, impoundments, or other man-made flow reductions or diversions shall be considered perennial.
- g. Manmade canals (*e.g.*, the Cape Cod Canal and canals diverted from rivers in Lowell and Holyoke) and mosquito ditches associated with coastal rivers do not have riverfront areas.
- h. Where rivers flow through lakes or ponds, the riverfront area stops at the inlet and begins again at the outlet. A water body identified as a lake, pond, or reservoir on the current U.S.G.S. map or more recent map provided by the Department, is a lake or pond, unless the issuing authority determines that the water body has primarily riverine characteristics. When a water body is not identified as a lake, pond, or reservoir on the current U.S.G.S. map or more recent map provided by the Department, the water body is a river if it has primarily riverine characteristics. Riverine characteristics may include, but are not limited to, unidirectional flow that can be visually observed or measured in the field. ~~In coastal areas, the unidirectional flow may be tidally influenced.~~ In addition, rivers are characterized by horizontal zonation as opposed to the vertical stratification that is typically associated with lakes, ponds, ~~and embayments~~. Great Ponds (*i.e.*, any pond which contained more than ten acres in its natural state, as calculated based on the surface area of lands lying below the natural high water mark; a list is available from the Department) are never rivers.

2. Mean Annual High-Water Line of a river is the line that is apparent from visible markings or changes in the character of soils or vegetation due to the prolonged presence of water and that distinguishes between predominantly aquatic and predominantly terrestrial land. Field indicators of bankfull conditions shall be used to determine the mean annual high-water line. Bankfull field indicators include but are not limited to: changes in slope, changes in vegetation, stain lines, top of pointbars, changes in bank materials, or bank undercuts.

a. In most rivers, the first observable break in slope is coincident with bankfull conditions and the mean annual high-water line.

b. In some river reaches, the mean annual high-water line is represented by bankfull field indicators that occur above the first observable break in slope, or if no observable break in slope exists, by other bankfull field indicators. These river reaches are characterized by at least two of the following features: low gradient, meanders, oxbows, histosols, a low-flow channel, or poorly-defined or nonexistent banks.

c. In tidal rivers, the mean annual high-water line is coincident with the mean high water line determined under 310 CMR 10.23.

3. The Riverfront Area is the area of land between a river's mean annual high-water line measured horizontally outward from the river and a parallel line located 200 feet away, except that the parallel line is located:

a. 25 feet away in Boston, Brockton, Cambridge, Chelsea, Everett, Fall River, Lawrence, Lowell, Malden, New Bedford, Somerville, Springfield, Winthrop, and Worcester;

b. 25 feet away in densely developed areas, as designated by the Secretary of the Executive Office of Environmental Affairs; and

c. 100 feet away for new agricultural and aquacultural activities.

Measured horizontally means that the riverfront area extends at a right angle to the mean annual high-water line rather than along the surface of the land.

Where a river runs through a culvert more than 200 feet in length, the riverfront area stops at a perpendicular line at the upstream end of the culvert and resumes at the downstream end. When a river contains islands, the riverfront area extends landward into the island from and parallel to the mean annual high-water line.

(b) The physical characteristics of a Riverfront Area as described in 310 CMR 10.58(2)(a) are critical to the protection of the interests specified in 310 CMR 10.58(1).

(c) The boundary of the Riverfront Area is a line parallel to the mean annual high-water line, located at the outside edge of the riverfront area. At the point where a stream becomes perennial, the riverfront area begins at a line drawn as a semicircle with a 200 foot (25 foot in densely developed areas; 100 foot for new agriculture) radius around the point and connects to the parallel line perpendicular to the mean annual high-water line which forms the outer boundary. When a river flows into coastal waters or an embayment, the river ~~shall end where it no longer has primarily riverine characteristics. Where the river's mouth cannot be readily identified, the river ends where a line drawn perpendicular to the shoreline no longer intersects the opposite bank.~~ at the mouth of coastal river line as delineated on the current Mouth of Coastal River map produced by the Department and subject to revision after public notice. If a mouth of coastal river line is not delineated on the current Mouth of Coastal River map, the issuing authority shall determine the mouth of coastal river line in accordance with the Department's most current Mouth of Coastal River Policy. A mouth of coastal river line shown on the Department's Mouth of Coastal River map shall not be used as evidence to prove that a stream is perennial; such a determination shall only be made pursuant to 310 CMR 10.58(2)(a)i.

(3) Presumption. Where a proposed activity involves work within the riverfront area, the issuing authority shall presume that the area is significant to protect the private or public water supply; to protect the groundwater; to provide flood control; to prevent storm damage; to prevent pollution; to protect land containing shellfish; to protect wildlife habitat; and to protect fisheries.

The presumption is rebuttable and may be overcome by a clear showing that the riverfront area does not play a role in the protection of one or more of these interests. In the event that the presumption is deemed to have been overcome as to the protection of all the interests, the issuing authority shall make a written determination to this effect, setting forth its grounds on Form 6.

The purpose of evaluating project alternatives is to locate activities so that impacts to the riverfront area are avoided to the extent practicable. Projects within the scope of alternatives must be evaluated to determine whether any are practicable. As much of a project as feasible shall be sited outside the riverfront area. If siting of a project entirely outside the riverfront area is not practicable, the alternatives shall be evaluated to locate the project as far as possible from the river.

The issuing authority shall not require alternatives which result in greater or substantially equivalent adverse impacts. If an alternative would result in no identifiable difference in impact, the issuing authority shall eliminate the alternative. If there would be no less adverse effects on the interests identified in M.G.L. c. 131, § 40, the proposed project rather than a practicable alternative shall be allowed, but the criteria in 310 CMR 10.58(4)(d) for determining no significant adverse impact must still be met. If there is a practicable and substantially equivalent economic alternative with less adverse effects, the proposed work shall be denied and the applicant may either withdraw the Notice of Intent or receive an Order of Conditions for the alternative, provided the applicant submitted sufficient information on the alternative in the Notice of Intent.

(d) No Significant Adverse Impact. The work, including proposed mitigation measures, must have no significant adverse impact on the riverfront area to protect the interests identified in M.G.L. c. 131, § 40.

1. Within 200 foot riverfront areas, the issuing authority may allow the alteration of up to 5000 square feet or 10% of the riverfront area within the lot, whichever is greater, on a lot recorded on or before October 6, 1997 or lots recorded after October 6, 1997 subject to the restrictions of 310 CMR 10.58(4)(c)2.b.vi., or up to 10% of the riverfront area within a lot recorded after October 6, 1997, provided that:

a. At a minimum, a 100 foot wide area of undisturbed vegetation is provided. This area shall extend from mean annual high-water along the river unless another location would better protect the interests identified in M.G.L. c. 131 § 40. If there is not a 100 foot wide area of undisturbed vegetation within the riverfront area, existing vegetative cover shall be preserved or extended to the maximum extent feasible to approximate a 100 foot wide corridor of natural vegetation. Replication and compensatory storage required to meet other resource area performance standards are allowed within this area; structural stormwater management measures may be allowed only when there is no practicable alternative. Temporary impacts where necessary for installation of linear site-related utilities are allowed, provided the area is restored to its natural conditions. Proposed work which does not meet the requirement of 310 CMR 10.58(4)(d)1.a. may be allowed only if an applicant demonstrates by a preponderance of evidence from a competent source that an area of undisturbed vegetation with an overall average width of 100 feet will provide equivalent protection of the riverfront area, or that a partial rebuttal of the presumptions of significance is sufficient to justify a lesser area of undisturbed vegetation;

b. Stormwater is managed according to standards established by the Department [in its Stormwater Policy](#).

c. Proposed work does not impair the capacity of the riverfront area to provide important wildlife habitat functions. Work shall not result in an impairment of the capacity to provide vernal pool habitat identified by evidence from a competent source, but not yet certified. For work within an undeveloped riverfront area which exceeds 5,000 square feet, the issuing authority may require a wildlife habitat evaluation study under 310 CMR 10.60.

d. Proposed work shall not impair groundwater or surface water quality by incorporating erosion and sedimentation controls and other measures to attenuate nonpoint source pollution.

The calculation of square footage of alteration shall exclude areas of replication or compensatory flood storage required to meet performance standards for other resource areas, or any area of restoration within the riverfront area. The calculation also shall exclude areas used for structural stormwater management measures, provided there is no practicable alternative to siting these structures within the riverfront area and provided a wildlife corridor is maintained (e.g. detention basins shall not be fenced).

2. Within 25 foot riverfront areas, any proposed work shall cause no significant adverse impact by:

(f) When an applicant proposes restoration on-site of degraded riverfront area, alteration may be allowed notwithstanding the criteria of 310 CMR 10.58(5)(c), (d), and (e) at a ratio in square feet of at least 1:1 of restored area to area of alteration not conforming to the criteria. Areas immediately along the river shall be selected for restoration. Alteration not conforming to the criteria shall begin at the riverfront area boundary. Restoration shall include:

1. removal of all debris, but retaining any trees or other mature vegetation;
2. grading to a topography which reduces runoff and increases infiltration;
3. coverage by topsoil at a depth consistent with natural conditions at the site; and
4. seeding and planting with an erosion control seed mixture, followed by plantings of herbaceous and woody species appropriate to the site;

(g) When an applicant proposes mitigation either on-site or in the riverfront area within the same general area of the river basin, alteration may be allowed notwithstanding the criteria of 310 CMR 10.58(5)(c), (d), or (e) at a ratio in square feet of at least 2:1 of mitigation area to area of alteration not conforming to the criteria or an equivalent level of environmental protection where square footage is not a relevant measure. Alteration not conforming to the criteria shall begin at the riverfront area boundary. Mitigation may include off-site restoration of riverfront areas, conservation restrictions under M.G.L. c. 184, §§ 31 to 33 to preserve undisturbed riverfront areas that could be otherwise altered under 310 CMR 10.00, the purchase of development rights within the riverfront area, the restoration of bordering vegetated wetland, projects to remedy an existing adverse impact on the interests identified in M.G.L. c. 131, § 40 for which the applicant is not legally responsible, or similar activities undertaken voluntarily by the applicant which will support a determination by the issuing authority of no significant adverse impact. Preference shall be given to potential mitigation projects, if any, identified in a River Basin Plan approved by the Secretary of the Executive Office of Environmental Affairs.

(h) The issuing authority shall include a continuing condition in the Certificate of Compliance for projects under 310 CMR 10.58(5)(f) or (g) prohibiting further alteration within the restoration or mitigation area, except as may be required to maintain the area in its restored or mitigated condition. Prior to requesting the issuance of the Certificate of Compliance, the applicant shall demonstrate the restoration or mitigation has been successfully completed for at least two growing seasons.

(6) Notwithstanding the provisions of 310 CMR 10.58(1) through (5), certain activities or areas are grandfathered or exempted from requirements for the riverfront area:

(a) Any excavation, structure, road, clearing, driveway, landscaping, utility line, rail line, airport owned by a political subdivision, marine cargo terminal owned by a political subdivision, bridge over two miles long, septic system, or parking lot within the riverfront area in existence on August 7, 1996. Maintenance of such structures or areas is allowed (including any activity which maintains a structure, roads (limited to repairs, resurfacing, repaving, but not enlargement), clearing, landscaping, etc. in its existing condition) without the filing of a Notice of Intent for work within the riverfront area, but not when such work is within other resource areas or their buffer zones except as provided in 310 CMR 10.58(6)(b). Changes in existing conditions which will remove, fill, dredge or alter the riverfront area are subject to 310 CMR 10.58, except that the replacement within the same footprint of structures destroyed by fire or other casualty is not subject to 310 CMR 10.58.

(b) Certain minor activities as identified in 310 CMR 10.02(2)(b)i., ~~provided the activity is not within any other resource area:~~

- ~~1. Unpaved pedestrian walkways for private use;~~
- ~~2. Fencing, provided it will not constitute a barrier to wildlife movement; stonewalls; stacks of cordwood;~~
- ~~3. Vista pruning, provided the activity is located more than 50 feet from the mean annual high water line within a riverfront area or from bordering vegetated wetland, whichever is farther. (Pruning of landscaped areas is not subject to jurisdiction under 310 CMR 10.00.);~~
- ~~4. Plantings of native species of trees, shrubs, or groundcover, but excluding turf lawns;~~

- ~~5. The conversion of lawn to uses accessory to existing single family houses in existence on August 7, 1996, such as decks, sheds, patios, and pools, provided the activity is located more than 50 feet from the mean annual high water line within the riverfront area or from bordering vegetated wetland, whichever is farther, and erosion and sedimentation controls are implemented during construction. The conversion of such uses accessory to existing single family houses to lawn is also allowed. (Mowing of lawns is not subject to jurisdiction under 310 CMR 10.00);~~
- ~~6. The conversion of impervious to vegetated surfaces, provided erosion and sedimentation controls are implemented during construction; and~~
- ~~7. Activities that are temporary in nature, have negligible impacts, and are necessary for planning and design purposes (e.g., installation of monitoring wells, exploratory borings, sediment sampling and surveying).~~
- ~~Activities not meeting the requirements of 310 CMR 10.58(6)(b) may be allowed through a Determination of Applicability or a Notice of Intent. If resource area boundaries are uncertain, a Request for Determination of Applicability or Notice of Intent should be filed.~~
- (c) On-site sewage disposal systems in existence on August 7, 1996 and the repair or upgrade of existing systems in compliance with 310 CMR 15.000. New construction of a system under 310 CMR 15.000 must comply with 310 CMR 10.58, subject to the presumption for the siting of systems in 310 CMR 10.03.
- (d) The expansion of structures, airports, and marine cargo terminals, provided they are owned by a political subdivision and the expansion activity was physically begun on or before November 1, 1996.
- (e) Projects for which a draft environmental impact report was prepared and submitted pursuant to M.G.L. c. 30, § 62B, on or before November 1, 1996, or as extended by the Department for just cause but no later than December 31, 1996.
- (f) Projects for which a building permit conforming to local requirements was filed on or before October 1, 1996 and granted on or before April 1, 1997, or as extended by the conservation commission for just cause by no more than 60 days.
- (g) The road and infrastructure shown on a definitive subdivision plan approved or endorsed under M.G.L. c. 41, § 81U, on or before August 1, 1996. Activities on the subdivided lots are subject to 310 CMR 10.58 unless they received a building permit under 310 CMR 10.58(6)(f).
- (h) Construction, expansion, repair, restoration, alteration, replacement, operation and maintenance of public or private local or regional wastewater treatment plants and their related structures, conveyance systems, and facilities, including utility lines.
- (i) Structures and activities subject to a M.G.L. c. 91 waterways license or permit, or authorized prior to 1973 by a special act, are exempt, provided the structure or activity is subject to jurisdiction and obtains a license, permit, or authorization under 310 CMR 9.00.
- (j) Activities within riverfront areas subject to a protective order under M.G.L. c. 21, § 17B, the Scenic Rivers Act.
- (k) Activities on land occupied by historic mill complexes.

10.59: Estimated Habitats of Rare Wildlife (for inland wetlands)

If a project is within estimated habitat which is indicated on the most recent Estimated Habitat Map of State-Listed Rare Wetlands Wildlife (if any) published by the Natural Heritage and Endangered Species Program (hereinafter referred to as the Program), a fully completed copy of the Notice of Intent (including all plans, reports, and other materials required under 310 CMR 10.05(4)(a) & (b)) for such project shall be sent to the Program via the U.S. Postal Service by express or priority mail (or otherwise sent in a manner that guarantees delivery within two days). Such copy shall be sent no later than the date of the filing of the Notice of Intent with the issuing authority. Proof of timely mailing or other delivery to the Program of the copy of such Notice of Intent shall be included in the Notice of Intent which is submitted to the issuing authority and sent to the Department's regional office.

Estimated Habitat Maps shall be based on the estimated geographical extent of the habitats of all state-listed vertebrate and invertebrate animal species for which a reported occurrence within the last 25 years has been accepted by the Program and incorporated into its official data base.

